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In The

Supreme Court of the United States

October Term 1952

No. [illegible] 189

EARL A. JETFORDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
[illegible]
COURT OF APPEALS
[illegible]

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No.

EARL A. JEFFORDS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1.[1] The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.

[1]The Joint Appendix is hereinafter cited as "App. p. ....". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. ....., p. .....", together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz., "Exh. BZ", those of defendants by the name of defendant and arabic number, viz., "Jeffords Exh. 1", in accordance with the designation at the trial.

JURISDICTION

The judgment of the U. S. Court of Appeals which is here sought to be reviewed is dated March 22, 1962 (App. p. 115). A Petition for Rehearing was filed by petitioner on April 9, 1962, within the twenty-day period allowed therefor under Rule 15 of the Rules of the Court of Appeals (App. p. 117). The Court of Appeals denied said Petition for Rehearing on April 20, 1962. The time for filing petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254, and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Can a defendant be held to have knowingly joined, with a purpose to further, an alleged single conspiracy embracing as parts thereof various transactions and involving several defendants solely from his participation in a small part of the transactions alleged where admittedly the great bulk of the evidence concerned transactions with which he had no connection, and none of the various transactions tried together depended for their success on that of any other?

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was found by the Court below not to be supported by any evidence.

STATEMENT OF THE CASE

1. The Indictment.

Petitioner Earl A. Jeffords, together with Fred A. Ossanna, James H. Towey, Benson M. Larrick, Isadore Blumenfeld and Harry Isaacs, were named as defendants in an Indictment returned in the District of Minnesota, Fourth Division, No. 4-59 Cr. 77, alleging, in sixteen substantive and one conspiracy count, a use of the mails in furtherance of an alleged scheme to defraud in violation of 18 *U.S.C.*, Sec. 1341 (Counts I through VII and X through XIII), a use of interstate wire communications in furtherance of the same scheme in violation of 18 *U.S.C.*, Sec. 1343 (Counts VIII and IX), shipments in interstate commerce of certain scrap allegedly obtained by fraud in violation of 18 *U.S.C.*, Sec. 2314 (Counts XIV through XVI), and a conspiracy to commit these offenses in violation of 18 *U.S.C.*, Sec. 371 (Count XVII). Petitioner Earl A. Jeffords was charged only under the conspiracy count: Count XVII. The other defendants were charged with devising the alleged overall scheme to defraud the Transit Company in the sixteen substantive counts. They were also charged in the conspiracy count with Jeffords.

This Indictment (4-59 Cr. 77) was consolidated for trial with another Indictment, No. 4-60 Cr. 13, returned against Fred Isaacs and Theodore Landy charging each of them, in one count, of conspiracy essentially the same as that alleged in Count XVII of the first Indictment.

Petitioner Jeffords was found guilty of the conspiracy count with which he was charged and the other defendants (with the exception of Landy and Blumenfeld) were found guilty of certain of the substantive counts as well as the conspiracy count.

The Indictment alleged, and the proof of the Government

was concerned with, a number of separate transactions which it was claimed were simply "parts" of a single over-all scheme and conspiracy to defraud the Transit Company of the assets which became surplus and available for sale as a result of the conversion by the Transit Company from a streetcar to bus operation.

DESCRIPTION OF THE DEFENDANTS AND THE RELATIONSHIP BETWEEN JEFFORDS AND THE OTHER DEFENDANTS

Petitioner Earl A. Jeffords is a duly licensed real estate broker and has been engaged in this business in the City of Minneapolis for about fifteen years doing business under the trade name of J & C Holding Company (V. 38, p. 6). Jeffords knew the defendant Ossanna and did business with him both before, during and after Ossanna became associated with the Transit Company. Jeffords handled as a real estate agent the sale of two substantial properties owned by Ossanna, one of which was known as Culbertson's Cafe and the other a building in downtown Minneapolis (V. 37, pp. 91, 92). After leaving the Transit Company, Ossanna also consulted Jeffords in connection with a hotel owned by Ossanna in the City of Minneapolis (V. 38, p. 41). All of Jeffords' dealings with the Transit Company on the three pieces of real estate with which he was involved and received commissions were with the defendant Ossanna except that, as mentioned in the Opinion of the Circuit Court of Appeals (App. pp. 30, 32), Larrick and Towey, along with Ossanna, authorized the issuance of the commission checks and Towey, along with Ossanna, signed the exclusive listing agreement which was the basis for the payment to Jeffords of a commission on the Snelling University property.

As stated in the Circuit Court of Appeals Opinion (App. p. 43), "There were 'insiders,' Ossanna, Larrick and Towey; there were 'outsiders' among them, Harry Isaacs, Fred

Isaacs and Jeffords." Ossanna, Larrick and Towey were officers of the Transit Company. Harry Isaacs and Fred Isaacs were in the scrap business doing business as American Iron & Supply Company and American Salvage & Supply Company.

Other than as mentioned above, there was no evidence that Jeffords even knew Larrick or Towey. There was no evidence that Jeffords knew Harry Isaacs or Fried Isaacs (or Theodore Landy, who was also in the scrap business and was one of the original defendants although acquitted by direction of the Court).

THE EVIDENCE RELATING TO JEFFORDS

Before discussing the facts of the case insofar as they relate to petitioner Jeffords, it is worthwhile to briefly describe the transactions to which over 90 per cent of the trial time was devoted. The trial took 17 weeks and of this time less than one week was spent on the Jeffords commissions transactions. No attempt was ever made by the Government to show that Jeffords participated in any way in the other transactions or to show that he had knowledge of the other transactions or even knew the participants therein with the exception of the defendant Ossanna.

A large part of the trial was devoted to the scrap transactions which involved the demolition and removal by American Iron & Supply Company of railway track, copper trolley wire, overhead feeder cable, 20,000 wood and metal poles, the underground transmission and distribution cables and miscellaneous scrap. The scrap was also the subject of considerable testimony concerning erasures and reductions of weights in the weight tickets by American Iron & Supply Company (V. 22, pp. 70-82; V. 16, pp. 31-9).

The Circuit Court of Appeals stated in its Opinion (App., p. 12 and at p. 42):- "A large portion of the trial was con-

sumed in developing the methods and procedures adopted in the disposition of scrap property, having a very substantial value." • • • "the fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof."

The Minneapolis Conversion Ordinance dated October 30, 1953, provided for the payment by the Transit Company of $922,790.00 to the City of Minneapolis in return for which the Transit Company was released from its franchise obligations to remove rails and repave the streets from which rail was removed, street cleaning and snow removal. This ordinance also inured to the benefit of American Iron & Supply Company by relieving it of certain obligations to repave streets from which it removed rail.

The Mid-Continent transaction involved the purchase by Harry Isaacs, d.b.a. Mid-Continent Development Company, from the Transit Company of certain real estate, machinery and equipment.

The Mexican Notes transaction involved the sale by the Transit Company to one George Francis, at a claimed excessive discount, of notes guaranteed by the Mexican National Bank which had been obtained by the Transit Company as payment for streetcars sold to the Mexico City Transit System.

The Hopkins Right of Way involved a 3.6-mile abandoned streetcar line right-of-way sold by the Transit Company to one Walter N. Carlson for a claimed grossly inadequate consideration. Certain members of the family of Fred Ossanna entered into an agreement with Carlson after the sale and shared in the profits of the resale with Carlson. Jeffords and one Marvin Benjamin purchased a small piece of this property from Carlson and subsequently resold this piece at a profit.

The Villamme payment of $7,500.00 to the Ossanna Foundation from his commission of $37,500.00 paid by the Transit Company for procuring the purchaser for the University and Snelling property.

The Towey Lots involved the purchase by defendant Towey from the Transit Company of two real estate lots for the grossly inadequate consideration of $500.00. These lots were purchased by Towey in the name of his uncle, Bernard Heintz, and subsequently sold by Towey, masquerading as his uncle, for the sum of $5,500.00.

As mentioned previously, the evidence concerning the above transactions comprised almost all of the testimony in the case. All of these separate and unrelated transactions were admitted as against the defendant Jeffords on the theory of one over-all scheme to defraud the Transit Company knowingly joined and participated in by petitioner Jeffords. This, despite the fact that no attempt was ever made to show that Jeffords dealt with anyone other than Ossanna and had no participation in or awareness of such transactions.

In its instructions to the jury, the trial court stated (V. 69, p. 10[illegible]. "There is no evidence that Jeffords participated in any transactions except his commission deals and some dealing in the Hopkins Right of Way."

Jeffords received $107,500.00 in real estate commissions from the Transit Company in connection with the sale of three of the many Transit Company properties which became surplus as a result of the conversion by the Transit Company from a streetcar to bus system. This consisted of a $75,000.00 commission on the sale of the Snelling University property, a $20,000.00 on the sale of the Currie Avenue Garage and a $12,500.00 commission on the sale of the steam plant (Cir. Ct. of Appeals Opinion, App., pp. 30-32). Although petitioner feels that many of the undisputed facts evidencing a lack of fraud in connection with these commissions were

overlooked by the Circuit Court of Appeals, petitioner recognizes that the Supreme Court will not grant certiorari to review the finding by the Circuit Court that there was evidence from which the jury could find such commissions fraudulent. For that reason, petitioner Jeffords will describe only the facts concerning the matters relied upon by the Circuit Court to sustain its finding that Jeffords knowingly joined an over-all conspiracy encompassing all of the transactions described above. The only basis mentioned in the Opinion of the Circuit Court for so holding is as follows (App., p. 42):

> "The role of appellants Fred Isaacs and Jeffords, charged with and convicted of participation in the over-all scheme, under the conspiracy count, while less prominent, was nevertheless important and essential in carrying out the scheme. * * * Jeffords was a close associate of Ossanna and manifested more than a passing interest in the affairs of the company. As a shareholder he became a member of Ossanna's Stockholders' Committee, which was successful in its endeavor to place Ossanna in control. As we have noted, he profited to the extent of $14,000.00 in the transactions involving the Hopkins Right-of-Way. His manipulations assisted in effecting the over-all scheme whereby the company paid to him a large sum of money without any consideration or benefit inuring to it."

Jeffords' name, along with approxamately 75 other shareholders, appeared on the Ossanna Shareholders' Committee letter (Govt. Ex. O-J), which solicited proxies for Ossanna in his attempt to oust the Green management at the Stockholders' Meeting of December 18, 1950. The only defendants whose names appeared on this letter are Jeffords, Towey and Ossanna. Jeffords was the owner of only a nominal number of shares (Govt. Ex. O-I). There was no evidence that Jeffords ever did any act to further the efforts of the Committee to unseat the Green management or that he in any way participated in the affairs of the company. The letter was in con-

nection with the Stockholders' Meeting of December 18, 1950. The over-all scheme alleged by the Government has its beginning in the scrap transactions of 1951 (Opinion of the Circuit Ct., App., p. 40) approximately three years before the first Jeffords commission transaction.

It is true that in addition to the Jeffords commissions transactions, the evidence shows some possible involvement by Jeffords in one of the other alleged objectives of the conspiracy, namely the Hopkins Right-of-Way.[2] For the purpose of this petition, it is assumed there was sufficient evidence to show some connection between petitioner and the Hopkins Right-of-Way but it was at best tenuous and was weighed by the jury in the light of evidence as to numerous other transactions with which petitioner admittedly had no connection or knowledge or purpose to further, and which occupied the bulk of the trial.

As stated above, the above two matters (the appearance of Jeffords' name on the Shareholders' Committee letter and Jeffords' connection with the Hopkins Right-of-Way) are the only facts relied upon by the Circuit Court of Appeals to support the finding that Jeffords knowingly joined, adhered to, and participated with all of the other defendants in a single over-all scheme to defraud the Transit Company.

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[2] There was uncontradicted evidence from which the jury could find that Benjamin had interested Jeffords in purchasing a portion of this right-of-way for a filling station site (V. 51, p. 37) and that at the time he was unaware that this property was a part of the Hopkins right-of-way (V. 51, p. 57). That of the $14,000.00 profit made by Benjamin and Jeffords on the resale of the portion they purchased from Carlson, $6,000.00 of the profit resulted from the sale of a part of the property to a purchaser found by Benjamin after many months (V. 51, pp. 42-3). Benjamin devoted considerable time in trying to get the remaining portion of the property zoned commercial without success (V. 51, pp. 45-6; V. 35, pp. 107-8). The additional $8,000.00 made by Benjamin and Jeffords resulted from the real estate agent for Carlson locating a purchaser and inducing Carlson to repurchase this unzoned portion from Benjamin and Jeffords (V. 35, pp. 86, 112, 114). This agent was successful in having the property zoned commercial.

The trial court apparently relied only on the Hopkins Right-of-Way matter in stating in its Opinion denying the motion of petitioner for a new trial, "Jeffords did have an interest in the Hopkins Right-of-Way which he disposed of to Carlson." (App., p. 75.)

The other petitioners have discussed in detail the facts concerning the Minneapolis Conversion Ordinance relating to the second "question" presented by petitioner and petitioner respectfully requests permission to incorporate said discussion by reference in this writ.

Petitioners duly objected to the submission of the alleged over-all scheme and conspiracy to defraud by motions, made both at the conclusion of the Government's case and at the close of all the evidence (V. 41, pp. 57, 59-61, 79-89, 92-3; V. 60, pp. 192-3), to sever and grant petitioner a separate trial (V. 45, p. 35), and for judgment of acquittal (V. 59, p. 167), all of which were overruled, and duly excepted (V. 70, pp. 1, 6) to the trial court's instructions to the jury submitting the over-all scheme as to them (V. 69, pp. 53, 85-6, 94-5, 104-7, 111, 141-2). Petitioners also sufficiently reserved objection to the instruction given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instructions requested withdrawing from the jury the issue of fraud in the passage of the ordinance (V. 70, pp. 4-5). Petitioners all adopted the motions and requests for instructions made by the others.

REASONS FOR GRANTING THE WRIT

I.

The court below decided an important question affecting the reach of conspiracy prosecutions, and in a manner in conflict with the decisions of this Court.

In the case of *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court held that the mass trial of a number of defendants on separate conspiracies, joined together only by one key figure common to all, prejudiced such defendants in making their defense. The Indictment charged one single conspiracy to obtain loans under the National Housing Act by means of fraudulent misrepresentations. The evidence showed that each of the applications was separately made and that there was no connection between the applicants except that they dealt with one "common and key figure," one Simon Brown, and that each had no interest in furthering the application of the others. The Court rejected the Government's argument that as to each defendant the evidence was sufficient, and that none was prejudiced because the jury exercised discrimination, acquitting some and convicting others. The answer to this contention, the Court held, was that there (as here), the trial court had instructed the jury that there was "but one conspiracy" and that to convict any defendant the jury must find that he was "a member of that conspiracy." The Court said (328 U.S. 750, at 768-9, 772-3, 90 L.Ed. 1557, at 1568-9, 1571):

> "On its face, * * * this portion of the charge was plainly wrong * * * and the error pervaded the entire charge. * * * The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the

similarity of purpose presented in the various applications for loans.

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference." * * *

"Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when, of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

Finally, the Court held it immaterial that the guilt of each defendant of a separate offense was "clear" and "manifest", in the absence of evidence that he adhered to a single overall conspiracy, and stated (328 U.S. 750, at 775-6, 90 L.Ed. 1557, at 1572):

"We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.

> "With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record.
>
> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of Sec. 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."

It would seem impossible to avoid the application of the above principles to petitioner Jeffords.

At the close of the Government's case, the trial judge stated to Government counsel that "here, of course, you have, in a way, several different conspiracies rather than one entire conspiracy. That's the difficulty, I think, in the lawsuit." (V. 41, p. 78).

The decision of the court below goes further in its application to Jeffords than to any other defendant. The Jeffords real estate commissions transactions were completely separate and isolated from other transactions, not dependent upon them for their success and not a "major" objective of the conspiracy alleged (as the Court indicated was the case with Fred Isaacs—App., p. 42).[3]

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[3] "The fraudulent disposition of the scrap became and was one of the major objectives of the scheme; it was part and parcel thereof, and, being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration."

(a) An important question is thus presented whether the decision below unduly broadens the reach of conspiracy prosecutions. In *Grunewald v. United States*, 353 U.S. 391, 404 (1957), this Court stated that it would "view with disfavor attempts to broaden the already pervasive and wide sweeping net of conspiracy prosecutions," as it had "repeatedly warned" in prior cases, and referred to Justice Jackson's familiar strictures against such prosecutions (see *Krulewitch v. United States*, 336 U.S. 440, 445-58) (1949) in concluding that "the important considerations of policy behind such warnings need not be again detailed," 353 U.S. at 404.

(b) The test of guilt applied by the court below is in conflict with those established by this Court.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Co. v. United States*, *supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States*, *supra*; *Blumenthal v. United States*, 332 U.S. 539 (1947).

In *Ingram* this Court renewed a prior warning that "evidence of knowledge must be clear, not equivocal," because "charges of conspiracy are not to be made out by piling inference upon inference" (360 U.S. at 680, quoting from 319 U.S. at 711) and held that the collaboration of employees with their employers in concealing a gambling operation illegal under local law was "colorless" on the "vital issue of knowledge" of their employers' wilful evasion of federal tax liability, because the "criminality of the enterprise under lo-

cal law provided more than sufficient reason for the secrecy in which it was conducted," 360 U.S. at 679:

"In the instant case there is no basis in the Opinion of the Court below for finding that Jeffords knew the "common and key figure" (Ossanna) was engaged in other transactions. However, even if there were such a basis, this Court in *Kottakos* approved the ruling of the Court of Appeals for the Second Circuit (151 F.2d 170, 173) that even knowledge by the petitioners that the common figure with whom they dealt was then engaged in similar transactions with others, was insufficient basis to support a finding of a common purpose (328 U.S. at 755), and this on the ground, as the Court later explained, that except for the common figure, "no conspirator was interested in whether any loan except his own went through," *Blumenthal v. United States, supra*, at 558.

It is submitted that the decision of the Court below as to Jeffords greatly widens the scope of conspiracy and can be cited to justify the mass trials of many defendants having no connection with each other and involving numerous unrelated transactions.

II.

In finding no error or prejudice in the trial court's instructions submitting the question of whether there was fraud in the procurement of the Minneapolis Conversion Ordinance, the court below decided a further question of importance in the administration of criminal justice in the federal courts, and in a manner in conflict with the decision of this Court in *Bollenbach v. U. S.*, 326 U.S. 607, 612 (1946). Petitioner incorporates by reference the argument made on this question in the petitions of Harry Isaacs and Fred Isaacs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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